Supreme Court, U.S.
FILED
SEP 23 1992
OFFICE OF THE CLERK

No. 91-1743

In The

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED MISSIONARY AVIATION, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF THE PETITIONER TO BRIEF IN OPPOSITION

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PREFACE

Using the Commissioner's own statement of the issue in this case (Brief in Opp., p. (I)), this Court should grant certiori and reverse the decision below. The Petitioner, United Missionary Aviation, Inc. ("UMA"), did not possess a "commercial purpose" and, in fact, the Petitioner will show the so-called "commercial purpose" to be merely a judge-made fiction designed to bypass the clear requirements of 26 U.S.C. § 501(c)(3). Fur-

ther, UMA's purpose *never* changed from that originally described to the Commissioner in 1968, i.e., Christian evangelism through "any and all legitimate means".

The faulty reasoning espoused by the Commissioner and adopted by the Tax Court and the Eighth Circuit Court of Appeals is manifestly evident in the Commissioner's argument in his Brief in Opposition and the Petitioner will seek in this, its Reply Brief, to focus this Court's attention on the salient point for which certiori is sought.

FACTS

First, a number of facts either misstated by the Commissioner or ignored or misconstrued by the Tax Court must be corrected. The evidence of these facts was almost entirely uncontroverted at trial. UMA represented to the Commissioner from the outset that its sole purpose was Christian evangelism. The initial *methods* chosen by UMA were air transportation of missionaries *and* the encouragement and fostering of cassette tape lending libraries.

In UMA's Exemption Application, Form 1023, dated April 30, 1968, question 10.f. asked for "A brief statement of the specific purposes for which you were formed" (Admin. Rec., Exh. 1-A). In response to this question, UMA responded:

"This organization established to conduct Christian activities in the interest of *introducing Jesus Christ to as many individuals as may be possible prior to His return to take His people out of this present world.* This is to be done by assisting missionaries and Christian workers by providing air transportation where needed, *speaking in Churches and other organizations where opportunity is given to present the story of Christ,* and to transport individuals to and from various mission fields where they may witness true Christianity in action" (Admin. Rec., Exh. 1-A). (Emphasis added.)

The specific provisions of UMA's Articles of Incorporation — narrow in purpose, but broad in application — were provided to the Commissioner during the course of this application process and were a part of the Commissioner's decision-making process.[1] Specifically, UMA's Articles of Incorporation stated, *inter alia*, that its purposes were to:

(a) *Supply air transportation* for missionaries and christian [sic] workers in furthering the spread of the Gospel of Jesus Christ.

(b) Evangelize lost sinners *using any and all legitimate means in order to make known the Gospel and win souls to Christ.*

(c) *Establish and edify local churches* according to the New Testament pattern.

(d) Accomplish this two fold purpose, [sic] we will engage in *all forms of missionary service* including the sending, maintenance and support of missionaries at home and in foreign countries; sending gospel teams to conduct evangelistic, literature and visitation crusades; *writing, printing and distribution of Christian literature*; Bible Conferences, *specialized forms of missionary work* such as aviation evangelism, medical centers, photography, *radio and television*; the building of missions, chapels and churches; and *other forms of missionary service as the Lord may lead.*"

(Admin. Rec., Exh. 1-A, p. 11 (Emphasis added)).[2]

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[1] Significantly, the very Application the Commissioner uses to justify his "change of activity" argument was *not even required* as a condition of UMA's exemption. 26 U.S.C. § 508(a).

[2] The Commissioner alleges that UMA's purpose changed from exempt to non-exempt because its activities changed from those specified in its application for exemption. While

Mr. Cole conducted a tape and supply ministry prior to UMA's formation and UMA continued that activity thereafter. This activity took a substantial amount of UMA's time, although it produced no net income in the beginning. IRS knew this from the original audit in 1969 (which was triggered by reported net income from the sale of its last airplane).[3] At the time of the first audit, UMA's primary activities related to its tape lending library activity and its rental from others of airplanes for missionary transportation.

The items depicted in UMA's blatantly evangelical catalogs were not primarily "home entertainment equipment" as characterized by the Commissioner, but were primarily directed toward supplies and equipment needed by anyone working to establish and maintain a Christian-message tape lending library. The catalogs were mailed exclusively to known Christian organizations or to those with whom they associated and UMA's request that the catalogs be passed along to others could reasonably be expected to involve only *other Christians* by virtue of their association.

The *sole reason* specified by the Commissioner in revoking UMA's tax-exempt status was its *activity*: *not* its purpose and *not* any alleged private

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that assertion has been factually refuted above, even if true it would not support the Commissioner's argument. The Commissioner's regulation, 26 C.F.R. § 501(c)(3)-1(d)(1)(iii), provides that if an organization is organized and operated exclusively for "any one or more" religious, charitable or education purposes, "exemption will be granted to such an organization *regardless* of the purpose or purposes specified in its application for exemption." *See also*, 26 C.F.R. §§ 501(c)(3)-1(d)(2), (d)(3)(i)(b), (d)(3)(ii) Example 3, and (e).

[3] Query: If the issue for the Commissioner *really* was UMA's "other than insubstantial commercial purpose", why didn't the Commissioner revoke UMA's exemption at the *first* audit when its activities were essentially the same as in 1974 and 1975 except for the *absence* of substantial net income?

inurement to any individual (e.g., Mr. Cole) (App. A, p. 22a). Despite the Commissioner's attempts to present private inurement as a "closet issue", the fact is he simply never alleged it and it *has never been* an issue in these proceedings.

Moreover, the evidence showed a complete *absence* of private inurement to Mr. Cole — just the opposite. Mr. Cole never received any salary from UMA, only nominal rent. In fact, as a result of the Commissioner's actions, what contributions there *were* to UMA stopped out of concern for their deductibility and Mr. Cole has subsequently had to contribute his own funds to continue UMA's original work. All proceeds from the sale by UMA of its MTES division were subsequently utilized by UMA in its tape, television and missionary evangelism activities.

ARGUMENT

De novo review by this Court is proper. *Bob Jones Univ. v. United States*, 461 U.S. 571 (1983); *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984); *Presbyterian and Reformed Publishing Co. v. Commissioner*, 743 F.2d 148 (3d Cir. 1984).

This Court has stated that tax exemption statutes are "liberalizations of the law in the taxpayer's favor, . . . begotten by motives of public policy, and are not to be narrowly construed." *Helvering v. Bliss*, 293 U.S. 144 (1934); *United States v. Pleasants*, 305 U.S. 357 (1939).

The Tax Court's reasoning in this case is flawed on essentially every ground:

A. UMA was *not* operated in the same manner as "any profitable commercial enterprise". Evidence of volunteer labor, wholesale pricing, and blatantly evangelical communications with prospective customers abound.[4]

B. UMA did *not* compete with other commercial firms. UMA's activities in furtherance of its evangelical purpose were narrowly limited to Christian organizations or those with whom they associated and to supplies and equipment to be used in establishing and maintaining Christian-message tape lending libraries.

C. Whether or not UMA realized net income was *irrelevant* to the determination of UMA's purpose — all that was relevant was whether there was a private inurement of that net income. "Profit" is necessary for *any* organization's viability. As has been argued in UMA's Petition for Certiori, the presence of profit only serves as a relevant factor in the search for statutorily prohibited private inurement.

D. UMA's accumulated net income was clearly invested in paying off its accumulated operating debts and in increasing its inventory, *not* in accumulating cash. This information was communicated to the Commissioner in at least two ways: (1) As reflected on the balance sheet informa-

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[4] Even if true, the relevance of such a finding *vis a vis* the requirements of the statute is questionable.

tion as a part of its annual information return, Form 990; and (2) Via Mr. Cole's frequent oral communications with senior IRS personnel in the Dallas, Texas Exempt Organizations Office.

The Commissioner continues to cite this Court's opinion in *Better Business Bureau v. United States*, 326 U.S. 279 (1945), out of context. In that case, the Court found that the organization under consideration was formed and operated to benefit the local for-profit business community by increasing consumer confidence in its members as opposed to its non-members. *That* was the other-than-insubstantial, non-exempt purpose in that case. Here, UMA benefitted *no one* except the recipients of its products and expertise and those who heard the Gospel message as a result.

The Commissioner's spurious reasoning is evident on page seven of his Brief in Opposition where he asserts that UMA has misstated the rule he seeks to establish, i.e., "that activity of a commercial nature, without more, necessarily destroys an organization's exemption." To the contrary, this is *precisely* the judicially-created rule the Commissioner attempts to establish.

The Commissioner relies on rhetoric of the Tax Court that "our focus is on the purpose toward which an activity is directed, rather than the nature of the activity itself." However, this case provides a transparent example of the Commissioner's hidden agenda and the sleight of hand the Tax Court

attempts by adopting that language *without* really applying it. The *only* direct evidence of purpose presented to the Tax Court was the testimony of Mr. Cole, and the organizational and operational documents in the record (including over sixty (60) testimonials from Christian organizations who had directly benefitted from UMA's activities) — all of which show that the subjective purpose of UMA was to spread the Christian gospel message *by whatever means possible*. In fact, the Tax Court *never* "focused" on UMA's purpose. Instead, it *completely ignored* the uncontradicted evidence of purpose. Rather, it focused on UMA's *activities* which the Tax Court said evidenced a "commercial purpose". In short, the Commissioner's rule is: Commercial activity establishes a commercial purpose, in and of itself.

What *is* this so-called "commercial purpose" found by the Tax Court to exist in this as well as in other cases? After all, purpose, by definition, drives activity. "Commercial purpose" has *never* been defined and stands merely as a bald assertion of fact — a "purpose" lacking any motive other than a presumed vicarious thrill on the part of the organization under siege to act in a commercial manner and make a profit for no apparent reason. Likely, it would be most difficult for the Tax Court to fabricate such a definition where private inurement is lacking since there would exist no rationale for the purpose.

In this case, neither the Tax Court nor the Commissioner could point to any non-religious, non-charitable or non-educational purpose since there was simply no evidence to that effect. All that could be found to justify their decision was the presence of commercial activity and profits.[5]

When is an organization's purpose more than "insubstantial"? Basically, whenever the Commissioner arbitrarily decides it is. The line is never clear and can be moved by the Commissioner at whim.

The real thrust of the rule the Commissioner seeks to establish is this: Most, if not all, tax-exempt organizations, at some time or another, to one degree or another, receive money in exchange for goods and services; take in more than they spend (if they are to exist); and conduct at least some of their activities in a commercial manner via contracts, credit, banking or the like. If this "commercial activity" establishes a "commercial purpose" which is more than "insubstantial", this rule permits the Commissioner to revoke their exemption! In other words, this judge-made rule will permit the Commissioner to successfully challenge the tax-exempt status of practically *any* tax-exempt organization or to deny exemption to practically *any* future applicant! *This* is the Commissioner's "hidden agenda" for future application of this new rule.

The Commissioner's analysis of *Presbyterian and Reformed Publishing*

[5] Using the Commissioner's "factual" test in "legal" clothing, a taxpayer could probably *never* satisfy its burden of disproving the *un*provable.

Co. v. Commissioner, 743 F.2d 148 (3d Cir. 1984) is fatal to his position. If the Tax Court was wrong to revoke Presbyterian's exemption because it accumulated *cash* to expand its printing capacity, then the Tax Court must also be wrong to deny UMA's exemption because it accumulated *inventory*, not cash, to expand its capacity to supply tapes and equipment to Christian tape-lending libraries.[6] UMA reported the use of its accumulated net income on its Form 990 and regularly notified Mr. R.A. Turrentine and Mr. Roy Schelenberg of the Commissioner's Exempt Organizations Office in Dallas, Texas of UMA's activities and was assured by them that UMA was in compliance with 26 U.S.C. § 501(c)(3) as per UMA's Articles of Incorporation.

Retroactive revocation of UMA's tax-exempt status cannot be equitable since UMA fully disclosed its original purpose, was subject to examination of its 1969 return on substantially similar facts and relied on assurances of senior IRS personnel that its activities complied with the law.

CONCLUSION

The real issue here is activity and profits, *not* purpose. UMA's purpose has *never* changed. When UMA was audited for 1969, its activities were essentially the same as they were in 1974 and 1975 — only the magnitude

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[6] The *real* reason the Commissioner and Tax Court revoked Presbyterian's and UMA's exempt status is because they found a "commercial purpose". The Commissioner obviously does *not* thereby contend that had UMA notified the Commissioner in advance of the *reason* for its accumulation of net income in inventory, he would *not* have revoked UMA's exemption.

of those activities had changed — yet the Commissioner did not deem UMA to be deserving of retroactive revocation of its exemption at that time. It was the existence of net income in 1974 and 1975 that triggered this audit and led to the spurious application of the so-called "commercial manner/commercial purpose" test developed by the lower courts.

UMA has shown in its Petition for Certiori and this Reply Brief how the development of this judicially-created rule has led to arbitrary and capricious revocation of tax-exempt status by the Commissioner in the absence of any clearly defined reference to the legislatively-mandated requirements and the legislative history underlying 26 U.S.C. § 501(c)(3). As a result, there now exists a direct conflict between the Third and Eighth Circuit Courts of Appeal.

For this and other reasons, certiori should be granted and the decision of the Tax Court reversed.

Respectfully Submitted:

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